Supreme Court, U.S.
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(4)

No. 00-1462

IN THE

Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

-v-

THE BANK OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION ON BEHALF OF THE RESPONDENT, THE BANK OF NEW YORK, AS EXECUTOR

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Petitioner adequately raise, preserve and press the purported constitutional issue in the proceedings below?

2. Are there any compelling reasons why this Court should grant review of the proceedings held before a Referee to hear and report in this Estate Accounting Proceeding?

3. Where the Petitioner, an attorney, knowingly and voluntarily participated in and sought affirmative relief based upon the proceedings before the Referee, appointed to hear and report in an Estate Accounting, without seeking a stay or appealing the order of appointment, should this Court grant a Writ of Certiorari?

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

Adrienne Marsh Lefkowitz — Petitioner
323 S. Doheny Drive, Apt. 207
Los Angeles, CA 90048
the accounting party, nominated fiduciary,
only outright beneficiary
pro se

The Bank of New York as Executor — Respondent
of the Estate of Nicholas Marsh
123 Main Street
White Plains, NY 10602
the objectant to the Lefkowitz accounting
represented by:
McCarthy, Fingar, Donovan, Drazen & Smith
11 Martine Avenue
White Plains, NY 10606
and Executor of the Estate of Irene Marsh — Respondent
formerly trust beneficiary

Stuart Salles, Esq. — Respondent
267 Broadway
New York, NY 10007
former temporary administrator of the estate
pro se

Loretta Marsh Fine — Respondent
150 East 69th Street
New York, NY 10021
trust beneficiary
represented by:
Todtman, Nachanie, Hendler & Spizz
425 Park Avenue
New York, NY 10022

Claudia Marsh Appelbaum — Respondent
The Bluff
West Summit Road
Tuxedo Park, NY 10987
trust beneficiary
represented by:
Greene & Zinner
202 Mamaroneck Avenue
White Plains, NY 10601

Greene & Zinner, P.C. — Respondent
202 Mamaroneck Avenue
White Plains, NY 10601
fee petitioner *pro se* (and counsel to
Claudia Marsh Appelbaum)

Schulte Roth & Zabel — Respondent
919 Third Avenue
New York, NY 10022
fee petitioner
represented by:
D'Amato & Lynch
70 Pine Street
New York, NY 10270

Shea & Gould
fee petitioner
(In bankruptcy by time of 1994 hearing,
did not appear at 1994 hearing or submit briefs.)

Julie Lefkowitz — Respondent
323 S. Doheny Drive, #207
Los Angeles, CA 90048
trust beneficiary who did not appear

Lauren Fine — Respondent
1151 N. Atlantic Boulevard
Ft. Lauderdale, FL 33304
trust beneficiary
Represented by:
Todtman, Nachanie, Hendler & Spizz
425 Park Avenue
New York, NY 10022

Solicitor General, Department of Law
The Capitol
Albany, NY 12224

CORPORATE DISCLOSURE STATEMENT
RE THE BANK OF NEW YORK

The Bank of New York is a subsidiary of The Bank of New York Co., Inc., a publicly traded company trading as BK, with headquarters at One Wall Street, New York, N.Y. 10286.

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THE RESPONDENT, THE BANK OF NEW YORK, EXECUTOR OF THE ESTATE OF NICHOLAS V. MARSH, OFFERS THIS BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI BROUGHT BY THE PETITIONER, ADRIENNE MARSH LEFKOWITZ

STATEMENT OF THE CASE

The Petition in this Estate Accounting Proceeding does not present any significant constitutional issues -- nor does it present any compelling reasons why a Writ of Certiorari should be granted. Discretionary review by this Court should be denied under 28 U.S.C. §1257 and Supreme Court Rule 10. Discretionary review should not be granted because:

1) the purported constitutional issues were not adequately raised or pressed below;

2) the Petitioner seeks to relitigate factual and evidentiary matters under the guise of a "due process" shibboleth;

3) the Petitioner sought affirmative relief based upon the very proceedings before the Referee whose appointment under a statute she now claims is unconstitutional, and is now barred from contesting the appointment;

4) the Petitioner, a lawyer, knowingly, voluntarily and fully participated in the Proceedings before the Referee, whose appointment she now claims violated due process, without taking an appeal of that appointment.

PRELIMINARY STATEMENT

The Petitioner has a documented penchant for relitigating issues. The Petitioner, a member of the bar of the State of New

York with an LLM, at every instance in this case has sought reargument, renewal and appeal and thereafter relitigated previously foreclosed matters, under the usual legal "laundry list" litany of "mistake of fact", "mistake of law", "newly discovered evidence", "fraud" and "prejudice". The Petitioner has been sanctioned and the sanction affirmed on appeal for her repetitive litigation practice. She has sought to disqualify the Respondent's attorneys on five separate occasions. She has sought the recusal of the Surrogate on at least three distinct occasions.

The Petitioner has a virtual sub-library in Lexis for the number of matters she has been involved with since 1988. A search reveals no less than 19 reported decisions. The Petitioner, in actions involving this Estate and the companion Estate of her mother, Irene B. Marsh, has been a litigant in the following Courts: Supreme Court, New York County; Supreme Court, Westchester County; Surrogate's Court, New York County; Surrogate's Court, Westchester County; Appellate Division, First Department; Appellate Division, Second Department; New York Court of Appeals; United States District Court for the Southern District of New York; United States Court of Appeals for the Second Circuit; and now the highest Court in this county.[1]

The present application for a Writ of Certiorari is illustrative of the Petitioner's litigation tactics.

COUNTER-STATEMENT OF THE FACTS

The Surrogate appointed David Rudenstine, a professor of law and assistant Dean of Cardoza Law School, pursuant to S.C.P.A. 506(1) to hear and report on this Estate Accounting Proceeding. The Petitioner never directly appealed that

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[1] This does not include ancillary litigation involving this Estate in Hong Kong.

appointment; instead she proceeded with the hearings conducted by the Referee.

The Petitioner's Estate Accounting Proceeding began with a 48-day hearing, at which 30 witnesses testified and hundreds of Exhibits, consisting of thousands of pages, were offered into evidence. The Record on Appeal ran to 7 volumes. During the course of that hearing, the Petitioner, a lawyer, had another law firm present with her to act as her "legal advisor".[2] The Petitioner did not appeal the appointment of the Referee but decided to proceed with the hearing conducted before him.

Based upon the proceedings before the very Referee she now claims was unconstitutionally appointed, the Petitioner affirmatively made a motion for a directed verdict and a distinct motion for summary judgment. The Petitioner also sought to confirm portions of the Referee's 145-page Report. After the Surrogate issued her Probate Decree modifying the Referee's Report, the Petitioner sought reargument.

The Surrogate then entered an amended Probate Decree, which confirmed some portions of the Report, rejected portions, and modified others. The Petitioner was surcharged in excess of $1,000,000, and a portion of the legal fees of the Respondents, Claudia Applebaum and Loretta Fine (the Petitioner's sisters), was directed to be paid out of the Petitioner's beneficial share of the Estate. This latter award to the Respondent's sisters was due to the harm the Petitioner had caused them as a result of the Petitioner's excessive litigation tactics.

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[2] The Petitioner's claim that she could not afford a lawyer during the proceeding (See, Petition, p. 2, footnote 2) is preposterous. Not only did she pay a lawyer to act as a legal advisor throughout the trial, she had - at last count - 17 different firms represent her in various matters, several of whom she subsequently sued for malpractice.

The Petitioner then appealed to the Appellate Division, First Department, whose panel of five Appellate Judges unanimously upheld the Surrogate's Probate Decree. In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25 (N.Y. App. Div., 1st Dept. 1999). Following that affirmance, the Petitioner unsuccessfully sought reargument in the Appellate Division. The Petitioner also sought leave to appeal to the Court of Appeals from the Appellate Division, which too was denied. (Appendix 6 of the Petition for a Writ). Following the denials of Petitioner's requests by the Appellate Division, the Petitioner then sought leave to appeal to the Court of Appeals from that Court. That, too, was denied. In re Marsh, 95 N.Y.2d 755, 734 N.E.2d 759 (2000). Then, having sought and been denied discretionary leave to appeal by the Court of Appeals, the Petitioner filed a Notice of Appeal as of right[3] with that Court, alleging denial of constitutional rights and the purported illegality of the Surrogate's Court Procedure Act §506. It was only then, after she appealed and lost, sought reargument and lost, sought leave to appeal on two occasions from two Courts which were denied, did the Petitioner finally give the statutorily required notice under N.Y. C.P.L.R. §1012 and N.Y. Executive Law §71, to the Attorney General of New York, that she was challenging the legality of a state statute.

Upon the filing of the Petitioner's Notice of Appeal the Court of Appeals initiated an inquiry into its jurisdiction to hear the appeal. After briefing by the parties on this issue, the Court of Appeals dismissed the appeal for "lack of a substantial

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[3] A very curious tactic since, if she believed she had a right to appeal on constitutional grounds she would have filed a Notice of Appeal as of right, rather than seeking leave to appeal on discretion. Under New York's Constitution, the Court of Appeals has jurisdiction only if there is a substantial constitutional question (with certain exceptions not relevant to this Petition.

constitutional question". In re Marsh, 2000 N.Y. Lexis 3895 (Dec. 21, 2000).

The New York Court of Appeals was correct in its determination that there was no substantial constitutional question raised and, therefore, no jurisdiction to consider the appeal. This Estate Accounting does not involve any constitutional question, much less a substantial one.

The Petitioner transmogrifies her knowing, willing participation in the proceedings before the Court-appointed Referee into a claim that she was shanghaied into participating in the proceedings against her will. This is not consistent with the facts.

Not only did the Petitioner knowingly, voluntarily participate in all proceedings before the Court-appointed Referee, more importantly the Petitioner affirmatively sought various forms of relief based upon the proceedings before the Referee she now claims was unconstitutionally appointed to hear and report. By omitting to mention these actions from her Petition, the Petitioner misrepresents her purported objections to the appointment of the Referee.

The Petitioner, a lawyer with her own knowledge of available legal remedies and as one who had a "legal advisor" with her during the trial, knew that she could have appealed the order of appointment itself, but she chose not to -- waiting instead to see if the hearing before the Referee would turn out in her favor.

I previously discussed the Petitioner's misstatement that she was financially unable to afford counsel at the hearing[4] and her misstatement concerning her voluntary participation before the Referee.

The Petitioner's statement that she raised these constitutional issues below is inaccurate except in the most superficial, vague manner. There is no reference in the Notice of Appeal regarding any constitutional challenge specifically to the N.Y. S.C.P.A. §506.[5]

Neither due process nor the equal protection arguments (which the Petitioner now mentions for the first time in the Petition for a Writ in the context of the wealthy being a protected class) appear in any meaningful way in the Petitioner's Brief to the Appellate Division. The only reference to N.Y. S.C.P.A. §506 is at two lines on page 61 of the Petitioner's Brief. The Petitioner's statement is: "If S.C.P.A. §506 permits such appointments it is constitutionally invalid." That is the totality of the statement. No constitutional analysis is offered; no

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[4] Curiously, the Petitioner claims she was too poor to retain counsel and then goes on to argue that she is a member of a protected class, i.e., the "wealthy" - to bolster her feigned "unequal protection" argument, p. 2, quote "It is a violation of due process and equal protection of the laws to subject 'the wealthy' to hearings by privately paid referees without consent and at great cost."

[5] Out of the 40 separate objections raised in her initial Notice of Appeal there is no mention of the S.C.P.A. 506 statute under which the Referee was appointed. One objection claims the award of attorneys fees violated due process "because the underlying petition and hearing sought payment from the estate." The other reference is at KK of the Notice of Appeal which reads "Violation of appellant's due process and other constitutional rights". There is no explanation or specificity as to what the complaint might be. Indeed, in her Brief to the Appellate Division, the Petitioner stated:

> "... Appellant must limit her appeal to only a few issues."

constitutional case law is cited or discussed; no notice was provided to the Attorney General as is required when a state statute is claimed to be unconstitutional. N.Y. C.P.L.R. §1012 N.Y. Executive Law §71. Such vague, general references to the constitution does not preserve a constitutional question. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed.2d 62.

The Petitioner's argument that the "wealthy" are a suspect classification for purposes of unequal protection analysis is ludicrous, misleading and wrong. N.Y. Surrogate's Court Procedure Act §506, the operative statute under which the Referee was appointed, hardly is applicable only to the wealthy. The statute provides for the discretionary appointment of a Referee by the Surrogate in any accounting where the amount involved exceeds $200.00 - hardly a marker of wealth.[6] (N.Y. S.C.P.A. §506(2)).

The New York Court of Appeals correctly rejected the Petitioner's assertions that she had raised or preserved constitutional issues and held that there was no substantial, constitutional question, and dismissed the appeal, *sua sponte*. In re Marsh, ___ N.Y.2d ___(N.Y. Dec. 21, 2000) Appendix 1A (2000 Lexis No. 3895 NY).

The Petitioner also mischaracterizes the Referee, David Rudenstine, as some political hack. David Rudenstine is a professor of law (and during the proceedings, the acting Dean of Cardoza Law School). There is not a scintilla of evidence that Mr. Rudenstine is a political crony or political hack. To color

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[6] In the particular context Estate where the Bank proved that the Petitioner had received a gift of $500,000 from the decedent in breach of the Agreement not to Change Wills, the Referee held that $500,000 was not a material breach in the context of this Estate.

this man in this manner, without any basis, is an egregious form of character assassination.

The Petitioner also mischaracterizes the legal status of the Referee appointed under S.C.P.A. §506(1). The Referee appointed in this proceeding is one to hear and **report**, not to determine. This is a critical distinction and one obliterated in the Petitioner's Brief in Support of the Writ. Where the Referee can only report, the Surrogate is the final arbiter and can accept, reject or modify the Referee's Report and even make new findings of fact. N.Y. S.C.P.A. §506(4). The Surrogate in this case exercised her judicial independence and, after reviewing the Report of the Referee, the entire record, and extensive submissions from all sides, issued her Probate Decree. The Decree accepted some portions of the Report, rejected others and modified still others. This was hardly a denial of due process or equal protection.

The Petitioner misrepresents the circumstances of the Referee's request for payment of his fees, improperly referring to it as a "clandestine" payment. The Petitioner materially fails to inform the Court that the Referee made a written application to the Court, on Notice to all parties, including the Petitioner, for his fees. The Petitioner did not file any opposition to that Application. The Surrogate, by Order served upon the Petitioner, granted the application. The Respondent Bank followed the Order of the Surrogate and made the payment. This was hardly a "clandestine" payment. Again, the Petitioner did not appeal that order.

The Petitioner also misrepresents the value of the family-owned corporations at $13 million. That appraisal was not accepted as the value of the companies. In fact the value of the companies was so minimal that it formed a basis for one of the surcharges against the Petitioner.

The appointment of a Referee to Report in a complex Estate Accounting without consent does not create any constitutional issue. Such appointments in New York have existed since before the first state Constitution in the 1700s. Cf. Steck v. Colorado Fuel & Iron Co., 142 N.Y. 236, 37 N.E. 1 (1894). It has long been the practice in Surrogate Accounting Proceedings (a successor to the Chancery Courts) to provide for appointments of Referees and Special Masters under specific circumstances. Mtr. of Luckenbach, 189 Misc. 529, 72 N.Y.S.2d 76 (Surr. Ct. Kings 1947) *aff'd* 272 App. Div. 928 (N.Y. App. Div., 2d Dep't. 1947). *See, too,* Federal Rules of Civil Procedure Rule 53(b). *See,* Ex Parte Peterson, 253 U.S. 300, 311, 40 S. Ct. 543, 547 (1920).

Ms. Lefkowitz attempts to relitigate for the fifth time the factual and evidentiary determinations made in her accounting proceeding on this Petition for a Writ of Certiorari. She has failed to demonstrate that there are any substantial constitutional questions, or that there are any compelling reasons why this Court should grant the Writ of Certiorari in this Estate Accounting.

The Petitioner is the former preliminary executor of the Estate of Nicholas V. Marsh. Her preliminary letters were suspended on March 19, 1990 pending a full hearing on her eligibility to serve as a fiduciary in this Estate. A written order confirming the suspension was signed on March 20, 1990.

After a ten–day hearing, the Surrogate issued a decision and order, dated April 19, 1990, which, *inter alia*, removed Ms. Lefkowitz as the preliminary executor and declared her ineligible to serve as the future executor and trustee of this Estate. That decision and order also appointed the Respondent, The Bank of New York (the "Bank") as the permanent executor and trustee upon its duly qualifying according to law.

On appeal, the First Department unanimously affirmed the March 20th and April 19th orders stating, *inter alia*, that the record supported a finding of improvidence justifying the Petitioner's removal. *See* Matter of Marsh, 173 A.D.2d 336, 575 N.Y.S.2d 284 (N.Y. App. Div., 1st Dep't 1991); appeal dismissed, 78 N.Y.2d 990, 580 N.E.2d 758 (1991); mot. for leave to appeal denied, 79 N.Y.2d 751, 587 N.E.2d 259. Ms. Lefkowitz filed a notice of appeal with the New York Court of Appeals, which was dismissed upon a finding that no substantial constitutional question was directly involved. In re Marsh, 78 N.Y.2d 990, 580 N.E.2d 758 (1991). Ms. Lefkowitz thereafter moved for leave to appeal to that Court, and that Court denied that motion. In re Marsh, 79 N.Y.2d 751, 587 N.E.2d 289 (1991).

Pursuant to N.Y. S.C.P.A. §506(1), Surrogate Preminger appointed Professor David Rudenstine as a Referee to Hear and Report in Ms. Lefkowitz's accounting proceeding. The Petitioner did not appeal the order appointing the referee. The Petition for a Writ of Certiorari arises from the decree entered in that Estate Accounting proceeding.

The accounting hearing began on May 11, 1994, spanned 48 days of testimony, and ended on January 3, 1995. Over thirty (30) witnesses testified at the trial. The transcript of the trial spans thousands of pages and Ms. Lefkowitz sought to admit hundreds of exhibits, many of multiple pages, into evidence. In addition, there were voluminous post–trial submissions and motions by the parties to the accounting. The Referee issued a 145 page Report, dated December 1, 1995. The Surrogate confirmed in part and modified in part the Report in an eleven page decision, dated July 29, 1997. That decision, and a subsequent decision by the Surrogate, were thereafter embodied in the Surrogate's April 23, 1998 Decree (the "Decree"). The New York Appellate Division, First Department, unanimously

affirmed the Decree. In re Estate of Marsh, 265 A.D.2d 253, 697 N.Y.S.2d 25 (N.Y. App. Div., 1st Dept. 1999).

Thereafter, the Petitioner brought on two separate motions to the Appellate Division, First Department, first to reargue that decision and second for leave to appeal to the Court of Appeals. Both motions were denied by the Appellate Division In re Marsh, ___ A.D.2d ____ (1st Dept. 2000) reported at Appendix 6A to the Petition. Thereafter, by yet another motion, the Petitioner sought discretionary leave from the New York Court of Appeals to appeal to that Court. The Court of Appeals denied that application, 95 N.Y.2d 755, 712 N.Y.S.2d 447, 734 N.E.2d 759 (2000), a copy of which is annexed to the Petitioner's Appendix at 42A. Following the denial by the Court of Appeals for permission to appeal to it, the Petitioner resorted to self help and simply filed a Notice of Appeal, as of right, with that Court.[7] The Court of Appeals dismissed the appeal finding no substantial constitutional issue directly involved. 2000 N.Y. Lexis 3895 (Dec. 21, 2000), Petitioner's Appendix 1A.

It is respectfully requested that the instant Petition should be denied in its entirety. Ms. Lefkowitz has failed to demonstrate that this appeal merits this Court's review on any grounds, including any set forth in Rule 10 to the Supreme Court Rules and 28 U.S.C. §1257.

Ms. Lefkowitz's Petition for a Writ of Certiorari should be denied for the following reasons, among others:

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[7] It is remarkable that the Petitioner believed she had to seek leave to appeal and after that application was denied, filed an Appeal as of right on the circumstances. These are precisely the litigation tactics she was sanctioned for and now she has damaged this Estate.

(a) Ms. Lefkowitz seeks a *de novo* review of the facts before the Court of Appeals, which is prohibited by 28 U.S.C. §1257 and Sup. Court Rule 10.

(b) Ms. Lefkowitz's claims of denial of "due process" are devoid of merit given her voluntary participation in the hearings, her voluminous post–trial submissions both to the Referee and to the Surrogate in connection with the hearings, her submission of opposition papers to the relief requested and her affirmative acts to confirm portions of the Referee's Report and to seek affirmative relief based on proceedings before the Referee.

(c) The Petitioner failed to directly appeal the appointment of the Referee.

(d) The purported constitutional issues were not properly raised below or pressed and are nothing more than a rehashing of her arguments concerning the factual findings and evidentiary rulings re-clothed under the cloak of "due process".

POINT I

THE PURPORTED CONSTITUTIONAL ISSUES WERE NOT ADEQUATELY RAISED OR PRESSED BELOW AND THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

The Petitioner's initial brief to the First Department disputed the facts adduced at the accounting trial, argued about procedural defects in the appointment of and proceeding before the Referee, disputed the evidentiary rulings and quibbled with

the Surrogate's application of the law to those facts and her exercise of discretion. These same complaints are now alleged to be of a constitutional nature, warranting this Court's discretionary grant of a review. The Appellate Division, First Department concluded that the Petitioner's contentions were devoid of merit. Ms. Lefkowitz's Petition For A Writ of Certiorari mischaracterizes the evidence adduced at the accounting trial, challenges the Referee's services and quibbles with the Surrogate's findings and the reasonable exercise of her discretion, none of which provide a basis for the Court to grant the Writ of Certiorari.

A) No Constitutional or Federal Questions Were Pressed Or Preserved.

In order for the Petitioner to be considered to have been denied "due process", the Petitioner must demonstrate that she did not receive notice reasonably calculated to apprise her of the actions and relief sought and to afford her an opportunity to be heard. Booke v. Joy, 88 A.D.2d 569, 451 N.Y.S.2d 393 (N.Y. App. Div., 1st Dep't 1982) *app. denied* 57 N.Y.2d 607 (1982). The Petitioner has not, and cannot, allege such a state of facts. The Petitioner had notice of all proceedings and fully participated in them. Moreover, the Petitioner never developed any substantial constitutional arguments below but merely interjected the constitutional buzz words into her laundry list of perceived wrongs.

Petitioner states that she raised these constitutional issues at pages 61-69 of her Brief to the Appellate Division. I invite review of those pages because that review will demonstrate that no constitutional issues were raised or pressed in any meaningful, adequate way. The Petitioner provided no analysis of her

purported constitutional questions nor cited any case applying due process to the facts of her case.[8]

The discussion and argument at pages 61-69 of the Petitioner's Brief reveals not constitutional arguments but arguments about evidentiary rulings, disagreement with factual findings, alleged misrepresentations by the Referee, alleged bias and purported procedural defects - virtually everything but a constitutional argument in favor of her claim. Under this Court's interpretation of its jurisdiction under 28 U.S.C. §1257 and Rule 10 of the Court's Rules, this is insufficient to raise a constitutional issue.

Merely alleging a federal question does not give rise to jurisdiction. Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902). Certainly the issue was not pressed or preserved as required. Illinois v. Gates, 462 U.S. 213, 218-219, 103 S. Ct. 2317, 76 L. Ed.2d 527 (1983); Webb v. Webb, 451 U.S. 493, 458, 101 S. Ct. 1889, 68 L. Ed.2d 391 (1981). Casual references to a constitutional question amidst unrelated arguments is insufficient. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed.2d 366 (1993).

The Court should defer in the absence of exceptional circumstances to the State Court's findings of fact. No exceptional circumstances are shown to deport from this principle. Hernandez v. New York, 500 U.S. 352, 366, 111 (S. Ct. 1859), 114 L Ed.2d 395 (1991).

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[8] The only citation to any federal case in the Petitioner's Brief is at p. 69 where two cases are cited for the proposition that due process applies to state laws.

The apparent attempt by the Petitioner to allege an unequal protection argument based upon a classification of the "wealthy" is not only frivolous and wanting in substance but also was never raised before. This provides no basis for review. Hodges v. Snyder, 261 U.S. 600, 601, 43 S. Ct. 435, 67 L. Ed.2d 819 (1923). Frivolous claims are not entitled to review. Crumpacker v. Indiana Supreme Court Disciplinary Comm'n., 470 U.S. 1074, 1074-1075, 105 S. Ct. 1829, 85 L. Ed.2d 130 (1985). Even more ludicrous are the purported public policy issues asserted at page 2 of the Petition that the Internal Revenue Service will be deprived of substantial revenue because the fees paid to a Referee will be deducted from Estate Tax Returns.

Further, under N.Y. C.P.L.R. §1012 and N.Y. Executive Law §71, whenever a challenge is made to the constitutionality of a state statute, notice must be given to the Attorney General. Cleary v. Board of Education, 243 A.D.2d 949, 953, 663 N.Y.S.2d 374 (N.Y. App. Div., 3d Dep't. 1997). The Petitioner did not provide that notice at the Surrogate's stage of the proceedings nor at the Appellate Division stage. It was not until she lost her two applications for leave to appeal and then filed a Notice to Appeal with the Court of Appeals did she provide such notice. This is important because if she had in fact raised a constitutional question, why did she not provide the notice required when a state statute is challenged? The answer to that rhetorical question is obvious.

POINT II

THE PETITIONER'S ACQUIESCENCE IN THE PROCEEDINGS BEFORE THE REFEREE BARS ANY COMPLAINT ABOUT HIS APPOINTMENT

The Petitioner, an attorney admitted to practice in New York, fully participated in all proceedings before the Referee. These proceedings included pre-trial conferences, the attorney fee applications and the 48-day Accounting and surcharge proceeding. The Petitioner never sought to stay or enjoin these proceedings. More importantly, she never took an appeal of the Order of Appointment, nor does she even include a copy of the Order in her Appendix to the Petition. Instead, she voluntarily participated before the Referee waiting to see how they would turn out.

Even more critical is the fact that the Petitioner sought affirmative relief based upon the proceedings before the Referee she now complains was unconstitutionally appointed. The Petitioner sought a directed verdict and, by a separate motion, summary judgment based upon the proceedings before the Referee. The Petitioner also sought to have the Surrogate confirm portions of the Referee's Report. Nor did the Petitioner appeal all portions of the Surrogate's Probate Decree entered after the Referee's Report. The Petitioner's voluntary acquiescence and applications for affirmative relief bars her from now complaining about his appointment or procedure. Chalu v. Tov-Le Realty Corp., 220 A.D.2d 552, 632 N.Y.S.2d 806 (N.Y. App. Div., 2d Dep't. 1995).

The Petitioner is barred from attacking the Appointment of the Referee or the proceedings thereunder.

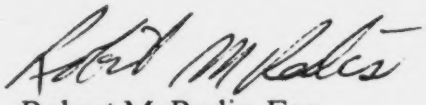
CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Dated: April 18, 2001
White Plains, New York

Respectfully submitted,

McCARTHY, FINGAR, DONOVAN,
DRAZEN & SMITH, L.L.P.

By: 
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